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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

HOWARD LIONEL TOFT, *Petitioner,*

v.

MARY G. KETCHUM, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Howard Lionel Toft, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled case on May 2, 1955.

OPINIONS BELOW

The Superior Court rendered no opinion.

The opinion of the Supreme Court of New Jersey, printed as Appendix A, *infra,* is reported at 18 N.J. 280, 113 A. 2d 671. The Supreme Court's Opinion on Reargument, printed as Appendix C, *infra,* is reported at —— N.J. ——, 114 A. 2d 863.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on May 2, 1955 (Appendix B, *infra*). After reargument, the Supreme Court affirmed its earlier judgment on June 20, 1955 (Appendix C, *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

May a state court deny to lawyers the right to bring actions for malicious prosecution based upon false and malicious complaints to an official body, and at the same time uphold the right of all other members of the community—including members of other professions and licensed occupations—to bring such actions under like circumstances?

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in relevant part as follows:

> "... nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

A. Prior Proceedings

Petitioner is a duly licensed and practicing attorney at law of the State of New Jersey (2a).[1] On Septem-

[1] This Petition makes reference to the following: Appendix to Brief of Plaintiff-Appellant used in the Court below, which accompanies this Petition; Certified Transcript of the proceedings below on file in the Office of the Clerk of this Court; and the Appendix to this Petition which is a part hereof. References to the Appendix

ber 24, 1953, Respondent made a complaint to the Monmouth County Ethics and Grievance Committee charging Petitioner with unprofessional and unethical conduct. After four days of hearings at which Petitioner and other witnesses appeared, the Grievance Committee filed a presentment with the Supreme Court of New Jersey charging the Petitioner with unethical and unprofessional conduct (App. 1). Thereafter, the New Jersey Supreme Court issued an order to show cause why Petitioner should not be disbarred or otherwise disciplined. On March 1, 1954, after the submission of briefs and oral argument, the Supreme Court discharged the show cause order (App. 2) thereby acquitting Petitioner of the charge against him.

On August 26, 1954, Petitioner instituted the present action for malicious prosecution against Respondent in the New Jersey Superior Court (App. 2). His complaint alleged *inter alia:* that the complaint which Respondent had filed against him with the Grievance Committee was false and without reasonable and probable cause; that Respondent had made the said charge maliciously; that the complaint made against him was ultimately dismissed; and that by reason of the said false and malicious prosecution, Petitioner had been greatly injured in his personal reputation and professional standing (2a-4a).

Respondent moved to dismiss the complaint on the ground that it failed to state a cause of action (10a). In substance, two bases for this motion were set out:

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to Brief of Plaintiff-Appellant are designated by "a" following the page number; references to the Appendix to this Petition are designated by "App." preceding the page number; and references to the Certified Transcript are designated by "Tr." preceding the page number.

(1) that there had been no prior suit between the parties, an essential element for an action for malicious prosecution; and (2) that a suit by a lawyer for malicious prosecution grounded upon a complaint made to an Ethics and Grievance Committee is against public policy (10a-11a). After briefs and argument, the trial court granted the motion to dismiss (12a-16a). In doing so, that court stated that Petitioner's complaint could not be sustained "as a matter of public policy" (14a), emphasizing that it wanted "to put [the ruling dismissing the complaint] on the broadest ground. . . ." (15a).

Petitioner then appealed to the Appellate Division of the New Jersey Superior Court (18a).

While the case was pending in the Appellate Division, and prior to oral argument, the New Jersey Supreme Court on its own motion certified the appeal directly to the Supreme Court (App. 2).

The case was argued in the Supreme Court on March 7, 1955, and that Court rendered its decision affirming the judgment of the Superior Court on May 2, 1955. In addition to the majority opinion, there was a concurring opinion, and two separate dissenting opinions (Appendix A, *infra*).

On May 10, 1955, Petitioner filed a petition for rehearing. At the same time, the New Jersey State Bar Association filed a petition for leave to intervene as *amicus curiae* and a petition for rehearing. The petition for rehearing was granted on May 23, 1955, and the Bar Association was granted leave to file a brief *amicus curiae* (Tr. VI). After reargument on June 13, 1955, the Court reaffirmed its prior decision in a brief per curiam opinion issued on June 20, 1955, indi-

cating that all of the Justices adhered to their previous positions as expressed in the four opinions originally rendered (Appendix C, *infra*).

B. The Opinions Below

Four separate opinions were filed by the seven justices who composed the Court below.

The opinion of the Court, delivered by Chief Justice Vanderbilt, dealt first with the question of whether a malicious prosecution action may be based upon the institution of a proceeding before other than a judicial tribunal. On this issue, the Court rejected the contention of Respondent that a proceeding before a judicial tribunal was necessary, and held that

> "a malicious prosecution may be predicated upon the institution of other than a judicial action, at least where such proceedings are adjudicatory in nature and may adversely affect legally protected interests." (App. 3)

Having thus disposed of the threshold issue, the Court then posed the "basic question": "whether public policy requires that the filing of a complaint with an ethics and grievance committee be privileged." (App. 4) The conflicting policy considerations were stated as being:

> "on the one hand there is the injury that may be suffered by any attorney as a result of the institution of disciplinary proceedings against him on what turns out to be improper or groundless charges." (App. 4)

and

> "on the other hand . . . it is in the public interest to encourage those who have knowledge of any un-

> ethical conduct of attorneys to present such information to the . . . ethics and grievance committee so that this court may carry out its constitutional disciplinary duties." (App. 4)

In weighing these conflicting interests, the Court emphasized the fact that it had been "charged by the Constitution with the solemn duty of ridding the bar of those who are unfit to practice our profession" (App. 5).[2] So, while taking cognizance of the fact that "to deprive an attorney of his right to recover damages in a civil action for the malicious filing of such a complaint without probable cause occasionally works a hardship," it nevertheless concluded that "this result must follow . . . to maintain the high standards in our bar" (App. 6). Accordingly, it held:

> "that the filing of a complaint with an ethics and grievance committee is privileged and that *an attorney cannot predicate a malicious prosecution action or similar suit upon it*" (App. 6) (Emphasis added).

Justice Jacobs, concurring separately (App. 6-11), expressed the view that Petitioner's complaint should have been dismissed because, in the light of the facts developed in the disciplinary proceedings, he believed that Petitioner was "in no just position to show lack of probable cause" (App. 8, 11). But he refused to join the majority in its announcement of "the far-reaching doctrine . . . that an attorney has no individual

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[2] New Jersey's Constitution, Article 6, Sec. 2, par. 3, provides in relevant part:

> "The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

redress no matter how patently false and malicious is the charge against him or how grossly hurtful is the wrong committed against him" (App. 8). In support of its position, he pointed out, the majority could cite no decisions, and, indeed, the decisions cited by the majority "all lend persuasive support to the contrary view" (App. 8). There follows in Justice Jacobs' opinion a discussion of the authorities (App. 8-9), and, finding substantial unanimity, Justice Jacobs then disposes of the "notion that the granting of protection to the individual attorney might impair the public interest by discouraging disclosures of misconduct." This argument, he points out, has "little substance" for an action for malicious prosecution may be maintained "only upon an affirmative showing that the ethics complaint was actually malicious, lacked probable cause and resulted in special injury. . . . It is difficult to believe that recognition of the action as thus limited would discourage any ethics complaints which ought to justly be made" (App. 10). His conclusion is succinctly stated:

> "While the individual attorney is entitled to no greater judicial protection . . . than the law affords to those who follow other professions and occupations, he is, in all justice, entitled to no less. The contrary holding, that those who devote so much of their lives towards attaining equal protection under law for others should be denied it for themselves, seems ironic indeed." (App. 10)

Both dissenting Justices agreed with Justice Jacobs that Petitioner should have a substantive right of action for malicious prosecution, but did not agree that the issue of lack of probable cause could be considered at this stage of the proceedings. Justice Burling's opinion dealt with certain technical issues and he sug-

gested the reinstatement of the complaint and further proceedings (App. 13). Justice Wachenfeld expressed strong disagreement with the majority's view that the public interest required the denial to attorneys of the right to protect themselves from malicious and false complaints. "Those who have legitimate grievances against attorneys need no cloak of immunity as an inducement to file complaints with grievance committees. Granting immunity will only serve to encourage the use of disciplinary proceedings as privileged sanctuaries to carry on personal vendettas and excursions of ill will . . . It will weaken, rather than strengthen, the disciplinary process. . . ." (App. 12-13) Justice Wachenfeld's disagreement with the majority's conclusion is best summarized in his own words:

> "I cannot join the majority when it concludes that the public interest . . . makes it necessary to *deny relief to an attorney* for the wrong which he has suffered—*relief which would ordinarily be available to any other member of the community in like circumstances.*" (App. 11-12) (Emphasis added.)

C. The Raising of the Federal Question

Because of the unusual manner in which this case was advanced through the New Jersey court system, the federal question on which review is being sought was not clearly and expressly raised until reargument in the New Jersey Supreme Court, which constituted Petitioner's first and in effect only opportunity to present the question.

In the trial court (Law Division, Superior Court), following the filing of Petitioner's complaint, the sole proceeding was an argument on a motion to dismiss upon which the trial judge ruled from the bench (12a-

16a). At this early stage in the proceedings, both Court and counsel were naturally concerned with the complex of preliminary problems always present in a law suit at its inception and there was no way to anticipate the possibility that the trial judge's ruling on the motion might ultimately give rise to a federal question.

When appeal was taken to the Appellate Division of the Superior Court from the trial judge's decision—since no opinion had been rendered by the trial judge—emphasis in the briefs was again placed upon the same problems which had engendered dispute in the trial court.[3] And when the Supreme Court, on its own motion, certified the case from the Appellate Division prior to argument, it had before it only the briefs submitted to the Appellate Division. Thus, it was not until after the Supreme Court issued its opinions—the first formal opinions rendered in the case—that the federal question, for which review is now being sought, became exposed.

Following the Supreme Court's decision, the federal question was expressly presented and strongly emphasized. Thus, Point I of Petitioner's Brief on Rehearing stated the question as whether "the majority opinion offends constitutional limitations . . . in that,—(a) it denies members of the bar the equal protection of the laws in violation of Section 1, Amendment XIV, of the Constitution of the United States," and also whether it deprives attorneys of their property without due

[3] At this stage the federal question was indirectly raised. Petitioner argued that to sustain the trial court's decision on the broad public policy ground "would, of necessity, result in relegating the members of an honorable profession to the status of second class citizens" (Brief of Plaintiff-Appellant, p. 12, at Tr. II); and Respondent argued to the contrary (Brief for Respondent, pp. 7-8).

process of law (pages 3-5, on rehearing, Brief of Plaintiff-Appellant, Tr. III). And the brief of the New Jersey State Bar Association as *amicus curiae* submitted pursuant to order of the Court, similarly raised the federal constitutional question expressly. (On Rehearing, Brief of the New Jersey State Bar Association, Intervenor and *Amicus Curiae*, pp. 10-12).

On rehearing, there was an actual oral reargument of the case, and new and additional briefs were submitted. Moreover, there was no adequate state ground on which to permit the decision to rest once the federal constitutional right was set up and claimed. In consequence, the federal question on which review is now being sought was necessarily passed upon by the Supreme Court of New Jersey when it reaffirmed its earlier decision by the subsequent per curiam opinion.[4] In view of the extraordinary fashion in which this case was brought to fruition, and the obvious inability of Petitioner to anticipate the unique decision of the Supreme Court of New Jersey, the federal question was raised at the first reasonable opportunity, *cf. Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-8; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 320; and is accordingly appropriate for review by this Court.

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[4] Language contained in two of the four opinions rendered in the Supreme Court indicates that the federal question had *in fact* been considered. Justice Wachenfeld noted that the relief being denied by the Court to attorneys was "available to any other member of the community in like circumstances" (App. 12); and Justice Jacobs characterized the majority's holding as denying to attorneys "equal protection under law" (App. 10).

REASONS FOR GRANTING THE WRIT

The decision below, at the outset, expressly upholds the right to predicate an action for malicious prosecution or similar suit upon the institution of other than a judicial proceeding, where such proceedings are adjudicatory in nature and may adversely affect legally protected interests (App. 3). As illustrations of the application of this principle, and using the cases cited by the Court below, an insurance agent would be permitted to predicate a malicious prosecution action upon a proceeding aimed at revoking his insurance license, *cf. National Surety Co.* v. *Page,* 58 F. 2d 145 (C.A. 4, 1932); a private detective could proceed upon a false complaint lodged with the licensing authorities, *cf. Melvin* v. *Pence,* 130 F. 2d 423 (C.A.D.C. 1942); a radio broadcaster could proceed on the basis of a malicious protest filed with the Federal Communications Commission, *cf. Rivers* v. *Dixie Broadcasting Corp.,* 88 Ga. App. 131, 76 S.E. 2d 229 (Ct. App. 1953); and a real estate broker, upon a false complaint filed with a real estate commission, *cf. Saum* v. *Proudfit,* 122 N.J.L. 96 (Sup. Ct. 1939).[5]

Having thus broadly established the right for persons who have been injured under the defined circumstances to procure relief in the courts through an action for malicious prosecution or similar suit, the decision below thereupon denies this right to attorneys. This holding, i.e., "that an attorney cannot predicate a malicious prosecution action or similar suit" upon a complaint made to a grievance committee, is founded upon

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[5] Another instance might be: a policeman, upon a complaint to the police department, *cf. Fulton* v. *Ingalls,* 165 App. Div. 323, 151 N.Y.S. 130 (N.Y. 1914); aff'd *sub nom. Fulton* v. *Richmond County Soc.,* 214 N.Y. 665, 108 N.E. 1094 (1915).

no legislative statute or policy, but rather upon a vaguely defined "public policy" which the Court purports to find in a routine state constitutional provision which gives to it "jurisdiction over the admission to the practice of law and the discipline of persons admitted." *N.J. Const., Art. 6, Sec. 2, Par. 3.* In so ruling, and in denying Petitioner's claim that this decision constituted a denial of due process and of the equal protection of the laws the Court below has decided a federal question of substance not heretofore decided by this Court in a manner which does not appear to accord with applicable principles announced by this Court.

A. As this Court has only recently noted: "The problem of . . . classification is a perennial one, admitting of no doctrinaire definition." *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489; and a state has substantial leeway under the Equal Protection Clause. *Ibid;* see *Smith* v. *Cahoon,* 283 U.S. 553, 566.[6] Nevertheless, it is also established that the Equal Protection Clause does prohibit "invidious discrimination," *Williamson* v. *Lee Optical Co., supra; Barbier* v. *Connolly,* 113 U.S. 27, 30, and distinctions which are arbitrary or irrational. *Cf. Ohio ex rel. Clarke* v. *Deckebach,* 274 U.S. 392, 397; *Smith* v. *Cahoon, supra,* at 566-7.

This Court has defined the "applicable principle in respect of classification" as follows:

> "the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, . . . and . . . it applies to the

[6] The decisions of this Court dealing with permissible classifications under the Equal Protection Clause have generally arisen in instances where state *statutes* have been challenged. In this case, however, no state statute is involved. See pp. 19-20, *infra.*

> exercise of *all* the powers of the state which can affect the individual or his property.... Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision....
>
> "Despite the broad range of the State's discretion, it has a limit which must be maintained if the constitutional safeguard is not to be overthrown. Discriminations are not to be supported by mere fanciful conjecture.... They cannot stand as reasonable if they offend the plain standards of common sense." *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U.S. 459, 461-2 (Emphasis added).

In this case, the Court below has set attorneys in a class by themselves and has taken from them a cause of action available to other members of the community under like circumstances. The distinction between lawyers and other licensed professions and occupations in the context of the issue presented offends "the plain standards of common sense." Certainly, as a *prima facie* proposition, it appears also to offend the guaranties of the Fourteenth Amendment, for "Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts both for relief and for defense under like conditions and with like protection and without discrimination." *Arizona Commercial Mining Co.* v. *Iron Cap Copper Co.*, 236 Mass. 185, 194, 128 N.E. 4, 7 (1920).

The only justification set forth by the Court below for its unprecedented ruling is the possibility that a putative complainant might be discouraged from presenting legitimate charges to an ethics and grievance committee against an attorney who has been guilty of unethical conduct because he might subsequently be subject to a

malicious prosecution action by the accused attorney. (App. 6) But as Justice Jacobs points out in his concurring opinion, the majority's notion "seems to have little substance" since it

> "must be remembered that the action in the nature of malicious prosecution would be maintainable *only* upon an affirmative showing that the ethics complaint was *actually* malicious, lacked probable cause and resulted in special injury; it would *not* be maintainable where the complaining party, though mistaken, acted with that elemental honesty of purpose and belief which may rightly be expected of all complainants. *It is difficult to believe that recognition of the action as thus limited would discourage any ethics complaints which ought to justly be made.*" (App. 10) (Emphasis added).

And Justice Wachenfeld, dissenting, goes even further:

> "Those who have legitimate grievances against attorneys need no cloak of immunity as an inducement to file complaints with grievance committees. Granting immunity will only serve to encourage the use of disciplinary proceedings as privileged sanctuaries to carry on personal vendettas and excursions of ill will disassociated from the true facts in a cause. It will weaken rather than strengthen the disciplinary process. . . ." (App. 12-13).

But even more important than the insubstantiality of the majority's position, is the question of why the same considerations of policy which it has made use of—however improvident and unwise—do not also apply with equal force to persons in other professions or licensed occupations; and the further question of the propriety, in a constitutional sense, of imposing this unusual restriction upon lawyers alone.

Certainly it is no more "in the public interest" to protect real estate and insurance salesmen from false and malicious complaints, than it is to protect members of the bar. No good reason suggests itself why it is any more "in the public interest" to encourage complaints against lawyers than against doctors, engineers, accountants, policemen, private detectives, and many others. If it is "in the public interest" to encourage complaints against lawyers, why should not the filing of complaints against persons serving in other professions and occupations affected with a public interest also be held "free from any threats of or danger of a possible malicious prosecution suit"? As Justice Jacobs so aptly observed: "while the individual attorney is entitled to no greater judicial protection under these circumstances than the law affords to those who follow other professions and occupations, he is, in all justice entitled to no less" (App. 10).

The decisions of this Court sustaining state laws regulating professional activities, e.g., *Williamson* v. *Lee Optical Co., supra; Semler* v. *Dental Examiners,* 294 U.S. 608; *Barsky* v. *Board of Regents,* 347 U.S. 442, 451; seem inappropriate here, for in the instant case, there is no regulatory scheme involved. This is not a situation where a legislature has selected "one phase of one field and [applied] a remedy there, neglecting the others." *Cf. Williamson* v. *Lee Optical Co., supra; A.F. of L.* v. *American Sash Door Co.,* 335 U.S. 538. Rather, it is an instance where a state court has selected a single special class and closed the courts to it, at the same time holding the courts open to all other members of the community under like circumstances. It is more pointed discrimination than regulation, and appears to fly in the face of this Court's admonition that the Four-

teenth Amendment intends that "all persons . . . should have like access to the courts . . . for the protection of their persons and property, the prevention and redress of wrongs, and . . . no impediment should be interposed . . . except as applied to . . . others under like circumstances." *Barbier* v *Connolly,* 113 U.S. 27, 31. See also *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison, supra.*

In instances where states have abolished causes of action, they have done so on an across-the-board basis applicable to all alike. For example, in the statutes abolishing civil actions for alienation of affections, criminal conversation, seduction and breach of promise to marry, e.g., *Civil Practice Act, N.Y.,* Sec. 61-a. and b.; see *Fearon* v. *Treanor,* 272 N.Y. 268, 5 N.E. 2d 815, remittitur amended, 273 N.Y. 645, 8 N.E. 2d 36, app. dismissed, 301 U.S. 667; the actions are not denied to any particular class of persons, but to *all* members of the community. Indeed, had they done otherwise, a substantial constitutional question would have been presented. *Cf. Langdon* v. *Sayre,* 74 Cal. App. 2d 41, 45, 168 P. 2d 57, 60 (1946).[7]

That is the vice in the ruling below. In focusing only upon lawyers when there is no rational basis for doing so, in abolishing a cause of action for lawyers and retaining the cause for persons other than lawyers under like circumstances, the Court below appears to have gone even beyond the broad range permitted by

[7] Again it should be noted that in cases where this Court has upheld the right of a state to abolish common law rights, see *e.g., N.Y. Central* v. *White,* 243 U.S. 188, 198, 200; *Silver* v. *Silver,* 280 U.S. 117, 123-4; *Mondou* v. *N.Y., N.H. & H.R.,* 223 U.S. 1, 50, state statutes were generally involved, whereas no statute is involved in the instant case. See pp. 19-20, *infra.*

this Court's decisions, and has denied to Petitioner "the equal protection of the laws" guarantied by the Fourteenth Amendment.

B. The decision below also presents a question under the Due Process Clause.

This Court long ago held that attorneys, after admission to practice, have a legally protectible interest of which they may not be deprived without due process of law. *Ex parte Garland,* 71 U.S. 333, 379; *Ex parte Wall,* 107 U.S. 265, 288. Moreover, it is well established that the "right to pursue a lawful business is a property right that the law protects against *unjustifiable* interference. Any act or omission which unjustifiably disturbs or impedes the enjoyment of such a right constitutes its wrongful evasion and is properly treated as tortious." *Kamm* v. *Flink,* 113 N.J.L. 582, 586 (E. & A. 1934).

Indeed, this Court has observed: "A right of action to recover damages for an injury is property . . . neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged." *Angle* v. *Chicago, St. P.M. & O.R. Co.,* 151 U.S. 1, 19; and this observation would seem to be equally as applicable to the actions of courts.

Despite this, the decision below summarily strips from attorneys the right to seek relief and redress from false and malicious accusers. It establishes an absolute pardon in advance for a class of private wrongdoers from civil liability. It requires attorneys to stand defenseless and mute against onslaughts to their reputation, no matter how false, malicious or unjustified, although false accusations of unprofessional conduct

can perhaps have more damaging consequences to lawyers than to any other group in the community.

A lawyer does not deal in goods; he maintains no inventories. His sole stock in trade are his integrity, reputation and competence. Take his reputation and, like removing one leg of a three-legged stool, he falls. He is seriously injured, and the opportunity to pursue his livelihood is impaired, if not entirely destroyed. When reputations are in issue, the stakes are indeed high for the lawyer.

Even the majority opinion of the Court below conceded that the rule it was promulgating might work "a hardship" upon attorneys (App. 6). Justice Jacobs pointed out that false, malicious and individualized attacks upon lawyers "wrongfully place in jeopardy the reputation and very livelihood of the particular practitioner involved" (App. 10). And Justice Wachenfeld observed:

> "An attorney, *perhaps more than anyone else,* may suffer serious injury when false and malicious accusations of unprofessional conduct are lodged against him in the form of a complaint before a grievance committee." (App. 11) (Emphasis added.)

As the decisions of Justices Jacobs and Wachenfeld demonstrate, the rule promulgated by the majority is not necessary in order to avoid discouraging legitimate complaints of unethical conduct to grievance committees, because those with legitimate grievances need no cloak of immunity. *Supra,* pp. 13-14. On the other hand, as is apparent, the rule is unduly oppressive upon attorneys and imposes unusual and unnecessary restrictions upon them in the pursuit of their profession. *Cf.*

Lawton v. *Steele,* 152 U.S. 133, 137. In this view, the decision below does not appear to conform to the standards which have been established to test state regulation under the Due Process Clause, and should be reviewed by this Court.

C. As indicated *supra,* the Court below has predicated its decision on its notion of public policy stemming from "our constitutional duty to maintain the high standards in our bar." (App. 6) But this Court has earlier cautioned:

> "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, *should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection.*" *Patton* v. *United States,* 281 U.S. 276, 306. (Emphasis added.)

The constitutional provision upon which this "duty" is founded is a typical one granting jurisdiction to the court to discipline members of the bar.[8] It contains no implication or suggestion to justify or authorize the abolition of a cause of action for malicious prosecution or similar suit; there is certainly no direct relation between the abolition of a cause of action for malicious prosecution and "the discipline of persons admitted." There is, moreover, no statutory provision upon which the majority's ruling may be bottomed. In consequence, the decision below — unsupported by any clear constitutional or legislative foundation — must be viewed for what it is: a pronouncement by a majority of the Justices of the highest state court stripping

[8] See fn. 2, p. 6, *supra.*

certain common law rights from only one class of people in the community. If the "legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations," *Lawton* v. *Steele,* 152 U.S. 133, 137, it would seem *a fortiorari* that a court may not.

The fact that the action complained of is that of the state court rather than of the state legislature imparts a special feature to this case. For, while action of a state court is no less "state action" within the meaning of the Fourteenth Amendment,[9] many of the principles announced by this Court in considering challenges to state regulation are inapposite here.

The action here is not by a state legislature so as to justify application of the oft-repeated statement of Chief Justice Waite made in *Munn* v. *Illinois,* 94 U.S. 113, 114, "For protection against abuses by legislatures the people must resort to the polls, not the courts." *Cf. Williamson* v. *Lee Optical Co., supra* at 488. There is no way here to defer to the judgment—theoretical or actual—of the state legislature, *cf. Tigner* v. *Texas,* 310 U.S. 141, for the state legislature is not involved. There is no need to allow "latitude . . . for the legislative appraisement of local conditions," *Ohio ex rel. Clarke* v. *Deckebach,* 274 U.S. 392, 397, for the problem is not a local one, and the appraisement was not legislative. And this is not an instance in which this Court will be sitting "as a super-legislature to weigh the wisdom of legislation," *Day-Brite Lighting* v. *State of Missouri,* 342 U.S. 421, 423, for the Justices of the Court below had no more facts before them in their consideration

[9] *Shelley* v. *Kraemer,* 334 U.S. 1, 14 *et seq.*

of the question presented by this case, than this Court would have if it grants review.

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In view of the constitutional questions involved, review of this case by this Court seems plainly warranted, since "objections which go to constitutionality" are still the concern of this Court. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 550. But, in addition, the decision below has broad ramifications.

Not only does it directly affect every lawyer in New Jersey, but also may affect lawyers in other jurisdictions who seek to bring a malicious prosecution action or similar suit in New Jersey for a false and malicious complaint made to an ethics committee elsewhere. And, under *Erie Rd. Co.* v. *Tompkins*, 304 U.S. 64, the federal courts sitting in New Jersey would be bound to apply it. *Cf. O'Connor* v. *Johnson*, 74 F. Supp. 370, 377-8 (W.D.N.Y. 1947). Moreover, the same sort of reasoning and the same resort to policy considerations which the Court below employed in this case to deny an action for malicious prosecution or similar suit can be utilized to impose limitations and restrictions of other kinds upon attorneys. Finally, provisions granting plenary power over attorneys, similar to that relied on by the Court below, appear in the constitutions and statutes of many other states; and, in consequence, the decision below may well become the foundation for a spate of special rulings for and against lawyers on this and other similar issues in numerous jurisdictions. Certainly, in an area of the law as fundamental and delicate as that involved in this case, the important question presented should not be left unresolved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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